In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY FEDERATION OF COMMUTERS CLUBS, and CONTRA COSTA COUNTY COMMUTERS ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES, and THE GREYHOUND CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court for the Northern District of California, Southern Division

Motion of Appellees, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, to Affirm Judgment and Brief in Support of Motion

ALLAN P. MATTHEW
GERALD H. TRAUTMAN
1500 Balfour Building,
San Francisco 4, California,

Attorneys for Appellees, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE
Of Counsel

Dated September 25, 1957

PARKER PRINTING COMPANY, 180 FIRST STREET SAN FRANCISCO 8

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Appellees Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation move the Court to affirm the judgment below, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, on the ground that it is manifest that the questions on which the decision of the cause herein depends are so unsubstantial as not to need further argument.

Brief in Support of Motion to Affirm Judgment

THE ISSUES

The issues presented by this appeal are:

1. Whether the Interstate Commerce Commission and the court below correctly decided that the Commission has exclusive and plenary jurisdiction under Section 5 of the Interstate Commerce Act to authorize a transaction under which a common carrier by motor vehicle would acquire control of a newly organized motor carrier to whom certain interstate and intrastate operating rights and properties would be concurrently transferred by the corporation acquiring such control.

2. Whether the court below abused its discretion in denying plaintiffs leave to amend their complaint where the motion was tardily filed after the only issue raised by the complaint had been heard and where the failure to include the additional issues in the original complaint was not due to inadvertence or oversight.

During a period of more than fifteen years, in an unbroken line of decisions, the Interstate Commerce Commission has exercised its jurisdiction under Section 5 of the Interstate Commerce Act to authorize comparable transactions. The Commission's authority is plainly declared by statutory provision and supported, without exception, by all reported authority.

STATEMENT OF THE CASE

This is a direct appeal from a final judgment entered on May 3, 1957 by a district court of three judges specially constituted pursuant to 28 U.S.C. §§ 2284 and 2325, dismissing appellants' complaint, which sought to set aside and annul an order of the Interstate Commerce Commission, and denying appellants' motion for leave to amend the complaint.

On February 8, 1954, Pacific Greyhound Lines, Golden Gate Transit Lines and The Greyhound Corporation (herein called "Pacific", "Golden Gate" and "Greyhound", respectively) filed joint applications with the Interstate Commerce Commission (herein called "the Commission") for an appropriate order, under Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5 (herein called "the Act"), authorizing a transaction under which (1) Pacific would acquire control of Golden Gate through ownership of capital stock; (2) Pacific would transfer certain properties and operating rights to Golden Gate; (3) Greyhound would acquire control of Golden Gate through Pacific; and (4) by a separate application as a matter directly related to the applications under Section 5, Pacific would continue operations over portions of the routes to be transferred to Golden Gate. (The foregoing requested authorization will herein be called "the transaction".)

When the joint applications were filed Pacific was a common carrier of passengers by motor vehicle in both interstate and intrastate commerce in the seven western states. The transaction described in footnote 2 of the Commission's report (Appellants' Statement as to Jurisdiction, Appendix D, p. 23, herein called "juris. st., App. .....") has now been consummated, Pacific has been merged into Greyhound and Pacific's operations are presently being conducted by Greyhound.* Golden Gate is a newly organized corporation authorized by its articles to engage in the transportation of passengers by motor vehicle. Golden Gate is not presently an operating common carrier, but it will become such upon consummation of the transaction authorized by the Commission's order. The operating rights to be

*Under the law of the State of Delaware which is applicable to that merger, pending actions by or against the merged corporation may proceed as if the merger had not taken place.

transferred to Golden Gate include both intrastate and interstate services, and comprehend local operations for distances up to 25 or 30 miles in the San Francisco Bay area, styled by the Commission "commuter operations". (Juris. st., App. D, p. 26)

At the public hearing on these applications, appellants County of Marin, County of Contra Costa, Marin County Federation of Commuter Clubs and Contra Costa County Commuters Association, plaintiffs below, appeared to oppose the applications. The applications were also opposed by representatives of Pacific's employees (herein called "the Union") who were plaintiffs below.* Following the public hearing briefs were filed, an Examiner's proposed report was issued, exceptions thereto were filed and oral argument was had before the full Commission. By its report and order dated July 6, 1955, 65 M.C.C. 347 (juris. st., App. D), the Commission found *inter alia* that the transaction was within the scope of Section 5(2)(a) of the Act, that the transaction was consistent with the public interest, and that an appropriate order should be entered approving and authorizing the transaction. Appellants' (protestants before the Commission) petition for rehearing and reconsideration was denied.†

On October 18, 1955, plaintiffs (appellants herein) commenced Civil Action No. 34985 to annul this order of the Commission. The complaint tendered but a single issue of law—whether the Commission exceeded its jurisdiction

*By stipulation and order of court prior to entry of judgment, Civil Action No. 34985 and the complaint on file therein were dismissed as to the Union.

†The Commission's order originally provided that unless the transaction was consummated within 180 days from the effective date of the order the authorization would be terminated. This period has from time to time been extended, the current expiration date being January 15, 1958.

in approving and authorizing the transaction. Pacific, Golden Gate and Greyhound intervened as defendants, and, after the statutory three-judge district court was convened, moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The United States and the Commission, after answering, jointly moved for judgment on the pleadings; appellants likewise moved for judgment on the pleadings. During final argument on these motions appellants made their initial request for permission to amend the complaint. Following submission of the motions directed to the original complaint, appellants filed a written motion for leave to amend the complaint by adding allegations challenging the Commission's finding that the transaction was consistent with the public interest, as well as many subsidiary findings, and by adding an allegation that the Commission abused its discretion in denying appellants' petition for rehearing and reconsideration. After argument, both oral and written, this motion was submitted for decision.

By its opinion dated April 12, 1957, the court granted the motion of defendants for judgment on the pleadings and the motion of defendants in intervention to dismiss the complaint, and denied plaintiffs' motion for leave to amend the complaint. All members of the court below concurred in the majority opinion upholding the jurisdiction of the Commission; Judge Harris dissented from denial of the motion for leave to amend. On May 29, 1957, appellants filed their notice of appeal from the judgment entered on May 3, 1957.

The issues presented by this appeal are:

1. Whether the Commission and the court below correctly decided that the Interstate Commerce Commission has exclusive and plenary jurisdiction under Section 5 of the Act to authorize a transaction under

which Pacific and Greyhound would acquire control of Golden Gate and Pacific would concurrently transfer certain properties and operating rights to Golden Gate; and

2. Whether the court below abused its discretion by denying plaintiffs leave to amend their complaint.

ARGUMENT

I. The Appeal from the Judgment Below Presents Questions Which Are So Unsubstantial That Further Argument Is Not Needed.

This appeal raises but two issues, neither of which has any substance in view of the terms of the statute and the holdings of all pertinent authorities. The questions presented do not warrant plenary consideration by this Court.

A. THE INTERSTATE COMMERCE COMMISSION AND THE COURT BELOW HAVE CORRECTLY DECIDED THAT ACQUISITION OF CONTROL OF GOLDEN GATE BY PACIFIC AND BY GREYHOUND IS A TRANSACTION WITHIN THE SCOPE OF SECTION 5 OF THE INTERSTATE COMMERCE ACT.

Appellants contend that the Commission does not have jurisdiction under Section 5 of the Act to authorize Pacific and Greyhound to acquire control of Golden Gate because Golden Gate is not presently an operating common carrier. The transaction approved by the Commission contemplates that Golden Gate will become an operating common carrier concurrently with the issuance of its capital stock whereby Pacific and Greyhound will acquire control of Golden Gate. The only jurisdictional question is whether Section 5 applies to an acquisition of control in cases where the corporation being controlled will become an operating common carrier concurrently with consummation of the transaction, but not before. In the terms of the statute, the question is whether the transaction constitutes an acquisition of control, "wheth-

er directly or indirectly", by "any carrier, or two or more carriers jointly, * * * of another through ownership of its stock or otherwise".

Golden Gate could not engage in the contemplated services, nor could Greyhound acquire control of Golden Gate, until authorized by the Commission. The court below correctly so held, stating succinctly:

> "We have no difficulty in finding that the proposed transaction is covered by the language of the section; it merely says that approval of the Commission is required when one carrier acquires control of another. That is precisely what the Greyhound Corporation and Pacific are seeking to do here; although Golden Gate will not attain the status of a carrier until the operating rights of Pacific are transferred to it, neither will the parent corporations acquire control until then, for the properties and operating rights are to be simultaneously exchanged for the stock." (Juris. st., App. B, pp. 6-7)

That the Commission's jurisdiction necessarily includes the exercise of its authority to these ends, including jurisdiction as to a carrier "resulting" from the transaction so authorized, is plainly declared by statutory provision as well as by all reported authority.

The Statute.

The authority exercised by the Commission in the instant case is derived from Section 5(2)(a) of the Act, which provides, *inter alia,* that it shall be lawful, with the approval and authorization of the Commission,

> "* * * for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *"

Congress has not only provided that approval of such a transaction by the Commission is required, but it has declared in plain and unambiguous language in Section 5(4) of the Act that:

> "It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate * * * the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, * * * or in any other manner whatsoever."*

Section 5(11) of the Act declares that:

> "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in *or resulting from any transaction approved by the Commission thereunder*, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; * * *." (Emphasis supplied.)

The transaction approved by the Commission comes precisely within the scope of Section 5. The jurisdiction conferred by the statute expressly extends to any carrier or corporation "*resulting from any transaction approved by the Commission*", and any unauthorized acquisition of control of such carrier is unlawful "however such result is attained, whether directly or indirectly, * * * *or in any other manner whatsoever.*" It is plain that Golden Gate will be a carrier "resulting" from the transaction here approved by the Commission and that Greyhound could not acquire control of Golden Gate without receiving prior authorization

*Strangely enough, Section 5(4) is not even cited in the jurisdictional statement.

from the Commission. Advisedly, and necessarily, Congress left no such hiatus in the Commission's authority as is here urged by appellants.

The Cases.

In its report and order approving and authorizing the transaction, the Commission stated that:

> "Jurisdiction is determined on the basis of facts existing at consummation, and Greyhound proposes to acquire control of Golden Gate concurrently with its becoming a carrier through the purchase. Jurisdiction has been asserted in numerous similar cases and is clear under Section 5." (Juris. st., App. D, pp. 41-2)

This exercise of the Commission's jurisdiction under Section 5 is in conformity with a uniform line of Commission decisions covering a period of more than fifteen years preceding the ruling herein.* Subsequent Commission decisions authorizing comparable transactions have consistently applied the same principles.† The Commission's exercise of jurisdiction herein is plainly authorized by the terms of Section 5. Moreover, the contemporaneous construction of a statute by the agency charged with the responsibility for

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*During this period of more than fifteen years, the Commission has frequently and consistently made rulings in conformity with its report and order herein. The following are representative: *Columbia Motor Service Co.—Purchase*, 35 M.C.C. 531, 534 (1940); *Consolidated Freightways, Inc.—Control—Consolidated Convoy Co.*, 36 M.C.C. 358, 359 (1941); *Takin—Purchase*, 37 M.C.C. 626, 627 (1941); *A. & W. Motor Lines—Purchase*, 38 M.C.C. 407 (1942); *Interstate Motor Freight System, Inc.—Purchase*, 39 M.C.C. 207, 208 (1943); *Transit, Inc.—Purchase*, 50 M.C.C. 433, 434 (1948); *Gehlhaus and Hollobinko—Control*, 60 M.C.C. 167, 169 (1954); *Southern Pacific Company Reincorporation*, 267 I.C.C. 523 (1947).

†See, for example, *Mickow Corp.—Purchase*, 65 M.C.C. 541 (1955) and *Colonial Fast Freight Lines, Inc.—Purchase*, 65 M.C.C. 619 (1956).

its administration is entitled to great weight when the agency's authority is questioned in the courts.*

Appellants' contention that the Commission had no authority under Section 5 to authorize Greyhound to acquire control of Golden Gate is foreclosed by this Court's decision in *Alleghany Corporation v. Breswick & Co.*, 353 U.S. 151 (1957), as well as by the several prior decisions construing "acquisition of control" as that term appears in Section 5 of the Act.

United States v. Marshall Transport Co., 322 U.S. 31 (1944);

New York Central Securities Corp. v. United States, 287 U.S. 12 (1932).

See, also:

Schwabacher v. United States, 334 U.S. 182, 191-2 (1948);

McLean Trucking Co. v. United States, 321 U.S. 67, 78-83 (1944).

Alleghany Corporation v. Breswick & Co., supra, held that a rearrangement within a railroad system constituted an "acquisition of control" under Section 5(2) of the Act. The Commission had jurisdiction to approve or disapprove such rearrangement within a railroad system notwithstanding the fact that the parents already controlled the subsidiary and the transaction represented only a change in the form of control. In the *Alleghany Corporation* case this Court said:

"In 1939, in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 145-146, arising under the Federal

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Alleghany Corporation v. Breswick & Co., 353 U.S. 151, 169 (1957); *United States v. American Trucking Associations*, 310 U.S. 534, 549 (1940); *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177, 182, 185 (1938).

> Communications Act, 48 Stat. 1064, 1065, 47 U.S.C. § 152(b), this Court rejected artificial tests for 'control,' and left its determination in a particular case as a practical concept to the agency charged with enforcement. This was the broad scope designed for 'control' as employed by Congress in the Transportation Act of 1940, 54 Stat. 899-900, 49 U.S.C. § 1(3)(b). See *United States v. Marshall Transport Co.*, 322 U.S. 31, 38.
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> "Not labels but the nature of the changed relation is crucial in determining whether a rearrangement within a railroad system constitutes an 'acquisition of control' under § 5(2)." (353 U.S. at 163-4, 166)

And in *Schwabacher* this Court referred to a series of decisions construing Section 5 of the Act, as amended by the Transportation Act of 1920, 41 Stat. 456, summarizing these decisions as follows:

> "The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system [Citations omitted]." (334 U.S. at 192)

The plain language of Section 5 and this series of decisions make it abundantly clear that the Commission had full authority to approve and authorize the transaction and that the transaction could not be accomplished without such prior approval. Another series of decisions gives further emphasis to the conclusion that appellants' challenge to the jurisdiction of the Commission is lacking in substance.

Section 408 of the Civil Aeronautics Act, 49 U.S.C. § 488, as noted by the court below, is comparable to Section 5 of the Interstate Commerce Act, both provisions

being directed to a common objective. Appellants here contend that the transaction is not within the scope of Section 5 because Golden Gate is not yet an operating common carrier. In *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F.2d 810 (C.A. 2d, 1941) the identical issue was raised respecting the jurisdiction of the Civil Aeronautics Board. A unanimous court of appeals refused to interpret so narrowly the control provisions of the Civil Aeronautics Act, stating by Judge Augustus N. Hand:

> "This seems to us an unduly literal interpretation of subdivision (5). In our opinion 'to acquire control of any air carrier in any manner whatsoever' is to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation. Any other interpretation would enable a steamship company, by organizing a subsidiary for air carriage, to escape the requirement of Section 408(b) that the 'Authority shall not enter * * * an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition'." (p. 815)

The decisions in *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, 197 F.2d 384 (C.A. D.C., 1952) and *Continental Southern Lines, Inc. v. Civil Aeronautics Board*, 197 F.2d 397 (C.A. D.C., 1952) cert. den., 344 U.S. 831, are in accord and expressly follow the *Pan American* decision.

The Potential Jurisdictional Void.

The dangers implicit in appellants' theory of the limited scope of Section 5 have been recognized by this Court in

rejecting any such interpretation of the meaning of "acquisition of control". In *Allegheny Corporation v. Breswick & Co.*, 353 U.S. 151 (1957), it was said with respect to common control transactions that the crucial issue is "not the immediacy or remoteness of the parent from the proposed transaction, for, as we said in the *Marshall Transport* case, the parent can always, by operating through subsidiaries, make itself more remote." (p. 169) The Court continued:

> "Denial of power to the Commission to regulate the elimination of the Jeffersonville from the national transportation scene would be a disregard of the responsibility placed on it by Congress to oversee combinations and consolidations of carriers and 'to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * *' and the further requirements that 'All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.' National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding § 1." (pp. 170-1)

Similarly, the Court of Appeals for the District of Columbia Circuit in *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, 197 F.2d 384, *supra*, has warned against unduly restricting the Congressional delegation of regulatory jurisdiction in the field of capital structures and inter-carrier relationships. Addressing itself specifically to the opportunity which would be afforded for successful evasion of the statutory objective if the agency's authority were to be restricted to common carriers presently existing, excluding carriers "resulting" from transactions submitted for the agency's approval, the court said:

> "Since such a company is not an air carrier until a certificate has been issued, it would appear at first blush

that its relationships to other types of carriers are not subject to the restriction of § 408. It has been held, however, in Pan American Airways Co. v. Civil Aeronautics Board, 2 Cir., 1941, 121 F.2d 810, that the very process of certification brings the control relationships between the newly certificated air carrier and its parent within § 408. Otherwise a common carrier seeking entry into the air transportation field would be able to evade § 408 merely by organizing a subsidiary and causing it to apply for a certificate of public convenience and necessity under § 401. We agree with the Pan-American decision that it would be unwise for the Board to close its eyes to the fact that with completion of the certification process, there would be in existence an air-surface carrier control relationship which important segments of the Act were designed to regulate." (197 F.2d at 386)

The Interstate Commerce Commission has also shown an awareness of such problems. The Commission has repeatedly called attention to dangers of this character.*

In an effort to close this void in the regulatory structure which would necessarily arise from adoption of their theory, appellants argue that the Commission should have acted under the limited jurisdiction conferred by Section 212 (b) of the Act, 49 U. S. C. § 312 (b). Appellants' suggestion is ill advised. Section 212(b), *by its terms*, is made expressly inapplicable to a transaction governed by Section 5 of the Act. As has already been demonstrated,

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*The Commission's statement in *Raymond Bros. Motor Transportation, Inc.—Purchase*, 37 M.C.C. 431, 433 (1941), is typical. See, also, the following Commission decisions illustrating the detrimental consequences if jurisdictional voids were to be created in this field: *Wilson Storage and Transfer Co.—Purchase*, 36 M.C.C. 221, 227 (1940); *Texas, New Mexico and Oklahoma Coaches, Inc.—Purchase*, 55 M.C.C. 269, 275 (1948); *Mooney—Control*, 56 M.C.C. 771, 781 (1950), 60 M.C.C. 103 (1954); *Bekins—Control*, 65 M.C.C. 56, 59 (1955).

and as both the Commission and the court below have held, this record presents a transaction within the scope of Section 5 and therefore is governed by Section 5 rather than by Section 212(b). The latter section merely authorizes, subject to such rules and regulations as the Commission may prescribe, the transfer of any certificate or permit authorizing interstate operations. But the transaction herein includes more than a mere transfer of a certificate authorizing operations; acquisition of control of Golden Gate is the crucial element which makes the transaction subject to Section 5. As previously pointed out, the control of Golden Gate could not lawfully be acquired without an appropriate order made under Section 5. Contrary to appellants' representation, this holding by both the Commission and the court below does not render Section 212(b) "completely meaningless". (Juris. st., p. 14) Section 212(b) has direct application to all transfers which, because not more than twenty motor vehicles are involved in the transaction, are exempt under Section 5(10) of the Act. See *United States v. Resler*, 313 U.S. 57 (1941).

When an order has been made in accordance with Section 5 of the Act, rested upon findings that the transaction complies with the exacting standards of Section 5, it conveys authority permitting such transaction to be carried into effect "without invoking any approval under State authority"; the Commission's authority is expressly declared by the terms of Section 5(11) of the Act to be "exclusive and plenary".*

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*See *Seaboard Air Line Railroad Co. v. Daniel*, 333 U.S. 118 (1948); *Schwabacher v. United States*, 334 U.S. 182 (1948); and *Thompson v. Texas Mexican Railway Co.*, 328 U.S. 134 (1946). As appellants seemingly would have it, state authority rather than the federal Commission should have paramount control over relations of this character between interstate carriers. (Juris. st., p. 9)

The Commission correctly determined that the transaction came within the scope of Section 5 and properly exercised its "exclusive and plenary" jurisdiction in approving and authorizing the transaction.

B. THERE WAS NO ABUSE OF DISCRETION BY THE COURT BELOW IN DENYING PLAINTIFFS LEAVE TO AMEND THEIR COMPLAINT.

We have previously pointed out that the complaint as filed raised but a single issue of law—whether the transaction was within the scope of Section 5 and therefore subject to the exclusive and plenary jurisdiction of the Commission. By the motion for leave to amend, plaintiffs requested permission to add new allegations challenging the Commission's finding that the transaction was consistent with the public interest, challenging many subsidiary findings which were alleged to be without record support, and charging the Commission with an abuse of discretion in denying appellants' petition for rehearing and reconsideration.

Defendants had answered the complaint, defendants in intervention had requested and obtained permission to intervene, the three-judge court had been convened, the motions directed to the complaint had been filed and the time for hearing thereon scheduled by the court—all without any indication that appellants intended to request permission to amend the complaint. The initial suggestion or indication that appellants might desire to ask leave to amend was made in the course of final argument on the motions to dismiss and for judgment on the pleadings. Appellants had in fact conceded that the case was ready for final judgment by making their own motion for judgment on the pleadings, which was heard concurrently with the motions of defendants and defendants in intervention. The actual motion for leave to amend the complaint was

made *after* the only issue raised by the complaint had been submitted for decision. No reasons justifying this tardy request were submitted by appellants. They admitted that the proposed amendment related to issues known to them when the complaint was filed and that the failure to raise these issues was not due to inadvertence or oversight; the *only* explanation offered of record was that appellants' counsel had reappraised his case and now desired to make such a sweeping challenge to the basic findings made by the Commission. Appellants renew this same explanation. (Juris. st., p. 18)

The mere statement of the undisputed facts bearing upon this unusual last minute request establishes without question that the court below was manifestly justified in denying the motion, after having given appellants full opportunity to present any reasons they may have had in support of their request for leave to amend. The only reason advanced was in effect that appellants had lost confidence in the only issue raised by the original complaint and therefore had decided to raise additional issues. The same reason has now been repeated. (Juris. st., p. 18) When the complaint herein was filed, appellants' counsel was thoroughly familiar with the record before the Commission, having represented appellants during the entire proceedings. The appellants' decision not to challenge the Commission's findings was advisedly made. If there had been the remotest chance that these findings were not fully supported by the record, it is inconceivable that appellants' counsel would have omitted to challenge them in the original complaint.

All of the factors to be considered by the court in exercising its discretion pursuant to Rule 15, Federal Rules of Civil Procedure, militated heavily against the motion for

leave to amend.* There was no abuse of discretion in the court's denial of appellants' belated request for permission to challenge the Commission's findings upon the additional grounds set forth in the proposed amended complaint, no showing having been made to warrant appellants' seriatim attack on the Commission's order.†

II. The Judgment Below Should Be Affirmed Forthwith.

Appellants' case is wholly lacking in substance. The judgment below should be affirmed forthwith because "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." (Rule 16(1)(c), Revised Rules of the Supreme Court of the United States)

The unsubstantial nature of appellants' case impels one to the inference that they are primarily interested in achieving delay and postponing consummation of the transaction approved by the Commission. Appellants cannot be unaware of the circumstance that further argument and delay would be an unwarranted burden on the Court, would be detrimental to the public interest and would benefit only appellants. The Commission found that the public interest would

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*The following are some of the cases justifying denial of appellants' motion for leave to amend their complaint: *In re Hudson & Manhattan R. Co.*, 229 F.2d 616, 621 (C.A. 2d, 1956), *cert. den.*, 351 U.S. 982; *Calhoun County v. Roberts*, 148 F.2d 901, 903-4 (C.A. 5th, 1945); *Schaad v. New York Life Ins. Co.*, 79 F. Supp. 463, 468 (E.D. Tenn., 1948); *Hart v. Knox County*, 79 F. Supp. 654, 658 (E.D. Tenn., 1948); *Friedman v. Transamerica Corp.*, 5 F.R.D. 115, 116 (D. Del., 1946); *Redmond v. O'Sullivan Rubber Co.*, 10 F.R.D. 536, 538 (W.D. Va., 1944); *Schick v. Finch*, 8 F.R.D. 639, 640 (S.D. N.Y., 1944).

†The dissenting opinion below is grounded on the unwarranted assumption that the statutory three-judge court may substitute its views on consistency with the public interest for the judgment of the Commission. On the other hand, the majority of the court below acted within well established limits upon the court's reviewing power.

not be served by the "impractical retention in a single entity of highly dissimilar operations * * * [causing] the undesirable results shown by this record". (Juris. st., App. D, p. 48) Appellants, displaying little regard for the controlling public interest, have shown no disposition to permit these "undesirable results" to be corrected without further delay. But Congress, in creating a special method for reviewing orders of the Commission, provided procedures "to avert the delays ordinarily incident to litigation". *United States v. Griffin*, 303 U.S. 226, 233 (1938) The practice of this Court pursuant to Rule 16 directly implements the Congressional policy to expedite judicial review of Commission orders.

CONCLUSION

Inasmuch as the questions on which decision of this cause depends are so unsubstantial as not to need further argument, the judgment below should be affirmed forthwith.

Respectfully submitted,

ALLAN P. MATTHEW
GERALD H. TRAUTMAN
1500 Balfour Building,
San Francisco 4, California,
Attorneys for Appellees,
Golden Gate Transit Lines,
Pacific Greyhound Lines and
The Greyhound Corporation

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE
Of Counsel

Dated at San Francisco, California, September 25, 1957.